Filed 4/30/19 Hample v. Santa Barbara County Probation Dept. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ROBERT HAMPLE, Plaintiff and Respondent, v. SANTA BARBARA COUNTY PROBATION DEPARTMENT, Defendant and Appellant.	2nd Civ. No. B292782 (Super. Ct. No. 16CV02220) (Santa Barbara County)

The Santa Barbara County Probation Department (Department) appeals a superior court judgment granting Robert Hample's petition for a writ of administrative mandamus. The judgment set aside a decision by the Santa Barbara County Civil Service Commission (Commission) that had ruled Hample's employment with the Department be terminated. We conclude, among other things, that the court did not err by vacating the Commission's decision and ruling that the penalty of employment termination was too severe. We affirm.

FACTS

Hample was a deputy probation officer with 17 years of experience in the Department. He was a peace officer under the Public Safety Officers Procedural Bill of Rights (POBOR) Act. (Gov. Code, §§ 3300, 3303.)

On January 7, 2015, Hample submitted a request for a continuance on a probation report. He testified that the "workload was crushing" and that he had been "in significant pain." On the request form, he stated the need for a continuance was "workload constraints." This was an approved phrase he had used in the past to obtain additional time to complete reports. He had not been notified about a new Department policy requiring more information on these request forms. Requests for continuances were routine in the Department and his requests "had never before been called into question."

Hample's request went to Carolyn Diaz, his immediate supervisor. Diaz believed that after July or August 2014 the term "workload constraints" might not be sufficient under the new policy to obtain a continuance. She contacted Kim Shean for clarification.

Shean was a department manager. Hample did not work with Shean on a "day-to-day" basis. He had a prior negative "interaction" with Shean and he felt she was "less than honest." He also believed she would not contact him "unless" he was "in trouble for something." In 2005, the Department suspended him for four days. The Commission overturned the suspension. Hample overturned the suspension at a Commission hearing. He learned from a deputy chief that Shean had been "monitoring [his] comings and goings." When Shean came to his office, Hample believed "there was a problem."

Shean asked Hample why he needed a continuance. Hample testified that he requested to "record the interrogation," but that he did not "refuse[] to answer questions." He believed that he was subject to an interrogation, that POBOR "had been triggered," and that he was entitled to record the meeting. Shean "refused to consent to a recording." She "got up and walked out."

The next day Shean and Senior Deputy Probation Officers Ruben Gutierrez and Scott Ingraham came into Hample's office "unexpectedly." Shean told Hample that if he "refused to talk to her," he "could be facing discipline to include termination." Hample replied, "You've now threatened me with termination. . . . It's my right [under POBOR] to record this interrogation." Shean agreed to Hample's request to have a union steward present. Hample testified that he did not refuse to answer questions. He hit the record button on his phone. Shean did not agree to be recorded. The meeting ended. Hample was "escorted out of the building" and was ultimately placed on administrative leave.

Chief Probation Officer Guadalupe Rabago testified there is "a wide range of disciplin[ary] levels available for an individual being disciplined." Rabago said Hample had "no disciplinary history noted in the proposed disciplinary action." He determined termination was required.

Hample appealed to the Commission following the Department's termination of his employment. After an evidentiary hearing, the Commission found Hample was not subject to "an interrogation" and was therefore not entitled "to the protections" under POBOR. It noted that Hample had a good record and seniority, but "the Department had good cause to

discipline [Hample] and imposed the proper discipline under the circumstances."

Hample filed a petition for writ of administrative mandamus to challenge the Commission's decision. The superior court, exercising its independent judgment, weighed the evidence in the record and made extensive factual findings. It ruled Hample was not insubordinate. The court said, "[Hample] was ordered to answer questions, and did not refuse to answer the questions, but only conditioned his compliance on what he thought was his right to record, however mistaken he may have been about that right." "An employee with 17 years of service described by the Decision itself as 'good,' should not be terminated for mistakenly asserting a right under POBOR . . . ." "His mistake did not affect his work product [or] cause any harm to anyone but himself." The court found the Commission "abused its discretion in refusing to administer a lesser disciplinary action." It granted the petition and ordered the Commission to "vacate its decision and consider a lesser disciplinary action."

DISCUSSION

The Superior Court's Authority

The Department contends the superior court "exceeded its authority" by vacating the Commission's decision and ordering it to "consider a lesser disciplinary action" than employment termination. It claims "the court mistakenly substituted its discretion for that of the [Commission]" and the court had to follow the Commission's ruling that employment termination for Hample is appropriate. We disagree.

This case involves a petition for writ of administrative mandamus to set aside the Commission's decision. The superior court correctly ruled that because "the administrative decision

substantially affects a fundamental vested right, i.e., the right to employment," the court must use its "independent judgment" in reviewing the entire record to determine the facts. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32; *Saraswati v. County of San Diego* (2011) 202 Cal.App.4th 917, 926-927.) The independent judgment standard allows the court to vacate the administrative decision where the administrative findings "are not supported by the weight of the evidence." (*Strumsky*, at p. 32; *Saraswati*, at p. 926.)

Here the superior court made extensive factual findings. (*Richardson v. Board of Supervisors* (1988) 203 Cal.App.3d 486, 493.) "An appellate court reviewing a final administrative decision examines the superior court's findings of fact . . . ." (*Davis v. County of Fresno* (2018) 22 Cal.App.5th 1122, 1133.) The superior court's factual findings are critical in determining whether the penalty of dismissal is appropriate. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 218; *Richardson*, at pp. 493-495.)

The Department cites appellate cases upholding administrative decisions to terminate employees for misconduct. "Generally speaking, '[in] a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion.' " (*Skelly v. State Personnel Board*, *supra*, 15 Cal.3d at p. 217.) "Nevertheless, while the administrative body has broad discretion in respect to the imposition of a penalty or discipline, 'it does not have absolute and unlimited power.' " (*Ibid.*) " 'It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion.' " (*Id.* at pp. 217-218.)

In deciding whether the administrative decision is an abuse of discretion "in the context of public employee discipline, . . . the overriding consideration . . . is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, '[harm] to the public service.' " (*Skelly v. State Personnel Board*, *supra*, 15 Cal.3d at p. 218.) "Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence." (*Ibid.*) A court may find dismissal is excessive, even though the administrative board has reached a different result. (*Id.* at p. 219.) "[I]f the penalty imposed was under all the facts and circumstances clearly excessive, the court is not powerless to act." (*Blake v. State Personnel Board* (1972) 25 Cal.App.3d 541, 553; see also *Seibert v. City of San Jose* (2016) 247 Cal.App.4th 1027, 1065.) Where dismissal is not appropriate, it may order the board or commission "to redetermine the proper penalty to be imposed." (*Blake*, at p. 554.)

" 'Termination is the most extreme penalty that can be imposed in the employment context, depriving the employee of the means of livelihood and making it more difficult to find other employment because of the questionable circumstances under which the prior job ended.' " (*County of Siskiyou v. State Personnel Board* (2010) 188 Cal.App.4th 1606, 1617.)

Courts have set aside board decisions that authorized employment terminations where there were mitigating factors, such as the employee's lack of a prior disciplinary record during a long career; minor misconduct; a single incident that was not harmful to public service; or where discipline was authorized, but a less severe penalty than termination was appropriate. (*Skelly v. State Personnel Board*, *supra*, 15 Cal.3d at pp. 218-219; *Richardson v. Board of Supervisors*, *supra*, 203 Cal.App.3d at pp.

494-495; *Vielehr v. State Personnel Board* (1973) 32 Cal.App.3d 187, 195; *Blake v. State Personnel Board*, *supra*, 25 Cal.App.3d at pp. 553-554; see also *Seibert v. City of San Jose*, *supra*, 247 Cal.App.4th at p. 1065.) Courts have set aside the most severe forms of discipline where the individual acted in good faith relying on an incorrect legal position (*Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, 87-88), or the termination of employment is for the employee's attempted "exercise of legislatively conferred employee rights." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 694.) Terminations of public employees also have been set aside by the courts where the employee had good cause not to comply with a supervisor's command. (*Parrish v. Civil Service Commission of Alameda County* (1967) 66 Cal.2d 260, 626, 634; *Forster v. City and County of San Francisco* (1966) 243 Cal.App.2d 787, 794.)

The Superior Court's Findings

" '[A]fter the superior court has applied its independent judgment to the evidence, all conflicts must be resolved in favor of the respondent and *all legitimate and reasonable inferences made to uphold the superior court's findings*; moreover, when two or more inferences can be reasonably deduced from the facts, *the appellate court may not substitute its deductions for those of the superior court*.' " (*Richardson v. Board of Supervisors*, *supra,* 203 Cal.App.3d at p. 493, italics added.) " '[W]here the superior court overturns [the board's or commission's] findings and an appeal is taken, the reviewing court gives the superior court's judgment the same effect as if it were rendered by any ordinary trial in that court.' " (*Ibid*.) The superior court makes " 'its own determination of the credibility of witnesses.' " (*Barber v. Long*

Beach Civil Service Com. (1996) 45 Cal.App.4th 652, 658, italics omitted.)

The superior court found Hample's request for additional time to complete a "pre-sentencing" report because of "workload constraints" was a "fairly routine" request. His prior requests "had never before been called into question." Rabago was asked, "[H]ave employees been disciplined, to your knowledge . . . for submitting a continuance request?" Rabago: "No. That's standard, and it happens. And given the reasons, it gets dealt with or counseled . . . ." The court said Rabago's testimony showed that employees who did not complete their reports timely because they "forgot" or had "been playing solitaire" would be subject to counseling, not termination. It found Hample's conduct was "much less egregious" than "playing solitaire" on the job or forgetting report due dates. The Commission abused its discretion by not imposing "a lesser disciplinary action" given the conduct involved.

The superior court also found Hample had a good job performance record in a 17-year career with the Department. Rabago was asked, "You're aware that Mr. Hample had no disciplinary history noted in the proposed disciplinary action, correct?" Rabago: "Correct. Yes." Rabago testified that during his employment history, Hample met or exceeded the standard for filing timely reports and there were "positive comments" about his "writing skills."

The Department contends Hample's assertion of POBOR rights was incorrect. Rabago testified that as "a sworn deputy probation officer," Hample was "subject to" POBOR. But the issue is not whether POBOR applied, it is whether Hample's conduct justified terminating his employment.

The superior court could reasonably infer that Hample's claim that he had a right under POBOR to record the conversation was not an attempt to obstruct his supervisors. Government Code section 3303, subdivision (g) provides, in relevant part, " 'The complete interrogation of a public safety officer may be recorded.' " The officer may initiate the recording. (*California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294, 306.) POBOR protects officers subject to interrogations by a commanding officer that could result in punitive action. (*Steinert v. City of Covina* (2006) 146 Cal.App.4th 458, 461.) It does not apply to routine communications in the "normal course of duty." (*Ibid.*) But POBOR applies "during the course of proceedings which *might lead* to the imposition of penalties." (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 681, italics added.) Penalties under POBOR include suspensions, demotions, as well as lesser sanctions, such as "written reprimand[s]." (*California Correctional Peace Officers Assn.*, at p. 306.)

The superior court found Hample "mistakenly" asserted a POBOR right, but it "did not affect his work product" or "cause any harm to anyone but himself." The finding that he was mistaken about his rights dispels the claim that he was insubordinate. (*Richardson v. Board of Supervisors*, *supra*, 203 Cal.App.3d at p. 494.) The court found, "[Hample] was ordered to answer questions, and *did not refuse to answer the questions*, but only conditioned his compliance on what he thought was his right to record, however mistaken he may have been about that right." (Italics added.) The Department has not shown that the court erred in making these findings, which support Hample's claims and are supported by his testimony. (*Barber v. Long Beach Civil*

Service Com., *supra*, 45 Cal.App.4th at p. 658; *Richardson*, at pp. 493-494.)

The superior court also could reasonably find the Commission "failed to give proper weight to the circumstances leading up to" Hample's request to record the conversation. (*Richardson v. Board of Supervisors*, *supra*, 203 Cal.App.3d at p. 494.)

Hample's testimony about his employment history with the Department shows why he believed he was subject to potential discipline. The Department had previously suspended him, but he had overturned that suspension. Hample did not believe this was a normal office meeting. A manager and two senior deputies came to his office with a letter. He testified Shean's rare presence in his office meant he was "in trouble for something." Shean was a manager he did not work with on a day-to-day basis. He had a prior negative interaction with her. Hample testified that he learned Shean had been "*monitoring* [his] comings and goings." (Italics added.) From this testimony, the superior court could reasonably infer Hample *believed* Shean had been investigating his conduct. (*Richardson v. Board of Supervisors*, *supra*, 203 Cal.App.3d at pp. 493-494.)

In addition, Shean agreed with Hample's request to have a union steward present. That is the standard procedure for a POBOR interrogation. "The right to representation arises when the interrogation focuses on matters *likely to result* in punitive action" (*California Correctional Peace Officers Assn. v. State of California*, *supra*, 82 Cal.App.4th at p. 306, italics added), and Hample testified he believed "POBOR had been triggered." The Department has not shown why the superior court could not reasonably find Hample's belief was genuine and that Hample

was acting in good faith by requesting a recording. (*Barber v. Long Beach Civil Service Com.*, *supra*, 45 Cal.App.4th at p. 658; *Richardson v. Board of Supervisors*, *supra*, 203 Cal.App.3d at p. 493.) Nor has it shown why the court was required to impose the maximum disciplinary penalty because of a good faith, but a mistaken, interpretation of POBOR or the term "interrogation." (*Magit v. Board of Medical Examiners*, *supra*, 57 Cal.2d at pp. 87-88.)

Moreover, the superior court could reasonably find Diaz's testimony also showed the potential for disciplinary action based on responses to Shean's questions. Diaz was asked, "[H]ad Mr. Hample responded [as] to why he needed more time to complete the reports, . . . could [he] have been found negligent or inefficient in completing his duties?" Diaz: "I guess it would be possible." "And is that potentially *grounds for discipline*?" (Italics added.) Diaz: "*Potentially*." (Italics added.)

The superior court found Hample's "POBOR rights were triggered" after Hample was "handed a written directive, stating that if he did not answer Ms. Shean's questions *he could be terminated*." (Italics added.) POBOR broadly applies to proceedings that "*might lead* to the imposition of penalties." (*White v. County of Sacramento*, *supra*, 31 Cal.3d at p. 681, italics added.) The court said, "*Yet, even then*, Ms. Shean would not allow recording and walked out *without even asking a question*." (Italics added.)

The issue is Hample's conduct, not his legal knowledge. The superior court could reasonably infer Hample's incorrect or premature assertion of POBOR rights was not a refusal to answer Shean's questions about the need for a continuance. Hample testified that had Shean questioned him, instead of

walking out of the room, he would have told her about his health issues that showed the need for the continuance.

The Commission's hearing officer asked Diaz to explain "what were the bad things that were going to happen" if the Department agreed to the recorded interview Hample requested. Diaz responded, "I don't know." Rabago testified that there is "a wide range of discipline levels available for an individual being disciplined." These include "[c]ounseling, additional training, nondisciplinary memos, letter of intent, letters of reprimand, suspension, up to and leading to firing." For this incident, he selected the most severe level. But "it is within the power of the superior court in a case of this kind to determine whether discipline imposed is so excessive as to constitute a manifest abuse of discretion." (*Seibert v. City of San Jose*, *supra*, 247 Cal.App.4th at p. 1065.) The superior court noted that "[w]hen asked if this matter could have been simply resolved if Ms. Shean had permitted [Hample] to record, Mr. Rabago responded that, '*yes, that could have been one of the options available to us*.' " (Italics added.) The Department has not shown why the court could not reasonably find that employment termination was not appropriate.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J. TANGEMAN, J.

Pauline Maxwell, Judge

Superior Court County of Santa Barbara

Michael C. Ghizzoni, County Counsel, Christopher E. Dawood, Deputy Counsel, for Defendant and Appellant.

Law Offices of Stephan Math and Stephan Math for Plaintiff and Respondent.